

WHITE SANDS FOREST PRODUCTS, INC.

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-10-A

Decided September 12, 1983

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) finding that White Sands Forest Products, Inc., owes \$24,166.98 to the Mescalero Apache Tribe for breach of Cooley Canyon-Dripping Springs Timber Contract No. MOOC-1420-3110.

Affirmed.

1. Contracts: Construction and Operation: General Rules of Construction--Indian Lands: Contracts: Generally--Indian Lands: Forestry: Timber Sales Contract: Generally

Contracts entered into by an Indian tribe and approved by the Bureau of Indian Affairs are generally subject to the same rules of construction as contracts between private parties. In construing an Indian timber sale contract, the Board of Indian Appeals will presume that the parties intended for all of its provisions to have meaning, and will, therefore, attempt to give effect to all of those provisions.

2. Indian Lands: Forestry: Timber Sales Contract: Generally--Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

The Board of Indian Appeals finds that the particular Indian timber sale contract before it imposes separate

obligations upon the purchaser to meet a minimum annual cutting requirement and to make a minimum annual payment.

3. Indian Lands: Forestry: Timber Sales Contract: Breach and Damages

Under the circumstances of this case, provision B6.12 of the standard Bureau of Indian Affairs timber contract does not apply to the calculation of liquidated damages resulting from failure to make the minimum annual payment required by the negotiated sections of the contract and does not provide a right to "cure" the failure to make the full payment.

APPEARANCES: S. Thomas Overstreet, Esq., Alamogordo, New Mexico, for appellant; Darrell N. Brantley, Esq., Alamogordo, New Mexico, for the tribe. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

White Sands Forest Products, Inc. (appellant), has sought review of an October 22, 1982, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee), finding that appellant owes \$24,166.98 to the Mescalero Apache Tribe (tribe) for breach of Cooley Canyon-Dripping Springs Timber Contract No. MOOC-1420-3110. For the reasons discussed below, the Board affirms the decision.

Background

Contract No. MOOC-1420-3110, between appellant and the tribe, was approved by the Bureau of Indian Affairs (BIA) on May 8, 1980. The contract

provided for appellant to log approximately 13,770 acres of tribal land by December 31, 1983. Specifically, contract provision A13(a) required appellant to log at least 7,349,000 feet, B.M., in 1980; 13,500,000 feet, B.M., in 1981; and 12,500,000 feet, B.M., in 1982. Under provision A17(h), appellant was further required to make a minimum annual stumpage payment of \$404,195 in 1980; \$742,500 in 1981; and \$687,500 in 1982.

Appellant requested relief from the minimum annual cutting requirement for contract year 1981. The request was denied and appellant ended the year in a deficit status. The BIA assessed appellant \$7,433.67 under contract provision A17(b) as liquidated damages for the failure to meet the minimum cutting requirement of contract provision A13(a). Appellant did not dispute this damage calculation and has paid the total amount assessed.

In addition, BIA billed appellant for \$24,166.98 for breach of provision A17(h). This amount represents the difference between the stumpage payment actually made to the tribe by appellant in 1981 and the minimum stumpage payment required for that year under provision A.17(h). Appellant disputes this bill.

The separate assessment under provision A17(h) was upheld by the Albuquerque Area Director on May 18, 1982, and by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) on October 22, 1982. On appeal to the Board, briefs have been filed by appellant and the tribe.

Discussion and Conclusions

This case requires the Board to construe four provisions of the contract. Two of the provisions, as previously discussed, set forth appellant's obligations. Contract provision A13(a) requires a minimum cut of 13,500,000 feet, B.M., in 1981. Provision A17(h) requires a minimum stumpage payment of \$742,500 in 1981.

The remaining two contract provisions concern breach. Standard provision B6.12 1/ states, in pertinent part:

If the Purchaser fails to meet the minimum cutting requirements and no relief is granted, the Purchaser shall pay, as liquidated damages, an amount for losses to the Seller arising from deterioration of deficient volume, a delay or loss of growth in the residual stand, delay in establishing a new stand, and from delay in receipt of planned income or other causes, if provided for in the contract. The volume of timber scaled during the following contract year shall not be applied to the minimum requirements for that year until the existing deficiency has been made up.

Provision A17(b) implements the liquidated damage provision:

Liquidated damages specified in Section B6.12, Standard Provisions shall amount to five percent per month of the stumpage value of the remaining deficient volume. Such liquidated damage payments shall be due at the close of a logging year as defined herein with an unrelieved deficiency in minimum cut, and at the close of each succeeding month while the deficiency exists. This payment will be based on stumpage rates calculated each such

1/ The contract between appellant and the tribe includes both standard provisions incorporated into virtually all BIA timber contracts, designated by a "B," and negotiated provisions peculiar to this particular contract, designated with an "A."

month and shall be based on the proportionate species composition shown in Section A7(a) herein. The Purchaser agrees that liquidated damage payments shall be made by withdrawal of the appropriate amount from his advance stumpage deposits.

[1] Contracts entered into by an Indian tribe and approved by the BIA are generally subject to the same rules of construction as contracts between private parties. See Walch Logging Co. v. Assistant Portland Area Director (Economic Development), 11 IBIA 85, 90 I.D. 88 (1983), reconsideration pending. Cf. Tomco, Inc., 29 IBLA 298 (1977); St. Joe Minerals Corp., 20 IBLA 272 (1975) (both construing Federal contracts). In construing an Indian contract, the Board will presume that the parties intended for all of its provisions to have meaning. It will, therefore, attempt to give effect to all of those provisions. Cf. A & J Construction Co., IBCA-1142-2-77, 85 I.D. 468 (1978) (contractor's interpretation of contract clause accepted when it gave effect to all of the language of the provision).

In reading the entire contract, it is readily apparent that its negotiated sections include a requirement for a minimum annual payment that is not a part of all BIA timber contracts. This payment is in addition to the more usual requirement that the purchaser harvest a specified amount of timber each contract year. The addition of a minimum annual payment requirement strongly suggests that the tribe was not satisfied with an agreement that merely provided a cutting schedule. The tribe apparently wanted to ensure a steady annual flow of income from the sale. It, therefore, sought and obtained a contract under which it was entitled to a minimum payment each year. 2/ In

2/ This fact clearly distinguishes the present contract from the one interpreted in Walch Logging, supra.

attempting to give meaning to the minimum cut and minimum payment provisions from the perspective of both contracting parties, it appears that they must have anticipated that if the minimum annual cut were met, the proceeds from the sale of that timber would approximate the amount specified as the minimum annual payment.

[2] The Board, therefore, finds that the minimum annual cutting requirement of provision A13(a) and the minimum annual payment requirement of provision A17(h) impose separate obligations upon appellant. Failure to meet either or both requirements constitutes breach of the contract for which damages may be recovered. 3/

In regard to the failure to make the minimum annual payment, appellant argues both that the liquidated damages payment already made "includes the loss of planned income," (Appellant's Brief at 6), and that "any loss in planned income for the year 1981 was made up by the Purchaser in January of 1982 as provided in Paragraph B6.12" (Appellant's Brief at 3). Appellant's first argument suggests that damages for any breach of the contract were intended to be covered by the liquidated damages provision. The second argument refers to the language in provision B6.12 stating that any deficiency

3/ The Board, therefore, rejects appellant's contention that the assessment for failure to make the minimum annual payment constitutes a penalty. For similar conclusions, see Gunnell v. Nello L. Teer Co., 205 Va. 28, 135 S.E.2d 104 (1964); Johnson v. Cowan, 59 Pa. 275 (1868) (A contract providing for the right to remove clay and requiring a minimum semi-annual payment should the specified amount of clay not be removed was found to be for "a fixed and certain sum; not contingent or conditional, and if the agreement be good for anything, it is extinguishable only in money. * * * It is highly improper to call the fixed sums to be paid in the event of the minimum of clay not being taken, liquidated damages. It is an alternative price to be paid in an event which was foreseen might happen, not as damages, but in payment for the privilege. However this may be, it is certain it is nothing like a penalty." (59 Pa. at 279, 280)).

in one contract year resulting from the failure to meet the minimum annual cutting requirement will be made up from timber logged during the next contract year before any cutting is attributed to the new year.

[3] In order to accept either of these arguments, the Board would have to find that the failure to meet the minimum annual payment requirement was covered by provision B6.12. Such coverage could be accomplished in either of two ways: the specific language of provision B6.12 might apply to the minimum annual payment, or provision B6.12 might have been referenced within the negotiated sections of the contract in regard to a breach of provision A17(h). The Board does not find that either of these situations exists.

Provision B6.12 is a standard clause appearing in all BIA timber sales contracts. By its specific terms, the provision concerns liquidated damages and the methodology for curing a cutting deficiency should a timber purchaser fail to meet the minimum annual cutting requirement established in the negotiated sections of the contract. The liquidated damages portion of the provision is not applicable unless it is specifically incorporated into the negotiated sections of the contract. It was so incorporated into the present contract through provision A17(b), as previously discussed.

Provision B6.12 was not written in anticipation of a contractual requirement to make a minimum annual payment such as is found in provision A17(h) of this contract. Therefore, on its face, the provision does not apply to the present situation.

The Board finds nothing in the negotiated sections of the contract which indicates that the parties intended provision B6.12 to be activated by

appellant's failure to make the minimum annual payment. 4/ Provision A17(b), which implements the liquidated damages portion of provision B6.12, does not include failure to make the annual payment. The parties were aware that the provision requiring a minimum annual payment had been added to the contract. If they so chose, they could have provided for damages for failure to make the annual payment in provision A17(b), or some other negotiated section. They did not. The Board thus finds that damages for appellant's failure to make the required minimum annual payment were not included in the liquidated damages assessment paid to the tribe.

Furthermore, the parties did not reference the cure procedure set forth in provision B6.12 as a means by which the failure to make a required minimum annual payment could be remedied. Because of this fact, the Board must reject appellant's argument that failure to meet the required minimum payment in 1981 was merely a "delay" in payment, which was cured with payments made for logging conducted in 1982. The failure to make this minimum payment resulted in a loss to the tribe of \$24,166.98, which it had contracted to receive in that year, regardless of other circumstances. 5/

4/ The parties were aware that changes could be made to the standard BIA contract provisions. See provision A17(d), modifying standard provision B7.4, and provision A17(e), which states: "In the event of a conflict between the Standard Timber Contract Provisions which form a part of this contract, and the Special Provisions set forth in this Section 17, the Special Provisions set forth in Section 17 will control." This provision is consistent with the general rule of contract construction that written or typed provisions control over printed provisions. St. Joe Minerals Corp., supra.
5/ Appellant argues that the tribe received full value by logging conducted in 1982 because it still retained the resource at the end of 1981. This argument overlooks the fact that although the tribe physically possessed the resource, it had given control of that resource to appellant under this contract and had bargained for cash payments in consideration thereof.

The Board finds that damages for failure to make the required annual minimum payment for 1981 were not included in the liquidated damages payment made under provisions B6.12 and A17(b) of this contract and were not subject to the cure procedure established in provision B6.12. Therefore, the BIA's assessment of \$24,166.98, the undisputed difference between the minimum payment for 1981 required under provision A17(h) and the amount actually paid to the tribe, is affirmed. 6/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, the October 22, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations), finding that appellant owes the Mescalero Apache Tribe \$24,166.98 in damages for breach of contract, is affirmed.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Jerry Muskrat
Administrative Judge

6/ The tribe asserts that in order to be made whole because of appellant's breach of this contract, it should also recover "damages for delay in making the minimum payment" in 1981 (Tribe's Brief at 10). Although it is possible that the tribe is here suggesting that it should receive interest on \$24,166.98, it provides no legal support for the argument and no total interest figure or reasonable interest percentage from which the Board could calculate interest. There is also no evidence that the tribe sought interest before BIA. The tribe had the opportunity to present its legal arguments to both BIA and the Board. Under these circumstances, the Board declines to consider the possible claim for interest. Cf. Burns v. Anadarko Area Director, 11 IBIA 133 (1983) (denying claim raised in petition for reconsideration that had not been raised below).